DISCUSSION PAPER

WORK-RELATEDNESS IN THE WORKERS' COMPENSATION SYSTEM

The Workers' Compensation Board invites submissions regarding this discussion paper.

Submissions should be mailed to:

Work-relatedness Consultation Project
c/o Paul Holyoke, Director, Operational Policy Branch
Workers' Compensation Board
2 Bloor Street East, 22nd Floor
Toronto, Ontario M4W 3C3

or they may be faxed to:
416-927-4995

Submissions must be received by February 4, 1991

The Workers' Compensation Board is providing special consultation seminars on the topic of work-relatedness. Dates of the seminars follow:

Place	Date
Hamilton	October 3
London	October 4
Windsor	October 5
Toronto	October 9, 10
Ottawa	October 16
Thunder Bay	October 17
Sudbury	October 18

To register for one of these seminars, please fax your name address and telephone number to the Operational Policy Branch at 416-927-4994, or telephone 416-927-3424.

Space may be limited, so register early.

CE DOCUMENT EST DISPONIBLE EN FRANÇAIS SUR DEMANDE.

April 20, 1990

DISCUSSION PAPER

Work-relatedness in the Ontario workers' compensation system

I ISSUE

Pursuant to s.86n of the Workers' Compensation Act, the Board of Directors reviewed and determined the issue of interpretation of policy and general law on which the Workers' Compensation Appeals Tribunal's Decision No. 72 turned. This review and determination was released in September 1988, and in it, the Board of Directors raised but did not resolve the issue of the evidentiary requirement to show work-relatedness in light of the statutory presumption in s.3(3) of the Act and in light of their determination. Rather, Board administrators were directed to carry out a policy review of the evidentiary issue, and after appropriate consultation, were to develop a policy proposal on the issue for consideration by the Board of Directors.

As Board administrators have worked on this issue, it has become increasingly apparent that, before proposing a policy on the evidentiary requirements, it is necessary to canvass a more fundamental question: what sort of links must be established between employment and an accident to entitle a worker to benefits?

Furthermore, this inquiry into the causal link is required as legal rights are more carefully delineated throughout the system, and especially at the Appeals Tribunal, and it is necessary to have a thorough and rational statement of the Board's policy on this topic. In particular, after the general principles are developed, it will be essential to translate the legal principles into policies and guidelines that workers, employers and decision-makers in the workers' compensation system will be able to understand and apply in individual cases in which decisions must be rendered quickly and correctly.

This paper explains the relationship of the evidentiary question to the question of the required links for work-relatedness, explores a possible policy approach to the general principles, and proposes a process for consultation. The development of clear guidelines for the Board's clients and decision-makers would follow only after appropriate consultation at a later stage.

II BACKGROUND

1. Relevant statutory provisions

Section 3(1) of the Act states:

> Where in any employment, to which this Part applies, personal injury by accident arising out of and in the course of employment

is caused to a worker, the worker and the worker's dependents are entitled to benefits in the manner and to the extent provided under this Act.

The terms "arising out of" and "in the course of" also appear in the definition of "accident" in s.1(1)(a) of the Act which provides:

"accident" includes,

(i) a wilful and intentional act, not being the act of the worker,
(ii) a chance event occasioned by a physical or natural cause, and
(iii) disablement arising out of and in the course of employment; ...

The Act does not define the terms "arising out of" or "in the course of" employment.

2. **Board of Directors' review of Appeals Tribunal Decision No. 72**

In its s.86n review of Appeals Tribunal Decision No. 72, the Board of Directors determined that the words "chance event" require there to be an identifiable accident that is causally connected with but separate from the personal injury. As a corollary, the scope of the term "disablement" was interpreted to include not only chronic injuries that gradually emerge over time without a sudden onset, but also injuries that unexpectedly result from normal occurrences, that is, unexpected results.

Flowing from these definitions was a recognition by the Board of Directors that there would be different evidentiary requirements for chance events and disablements because of the wording of s.3(3). That section provides that:

Where the accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of employment and, where the accident occurred in the course of employment unless the contrary is shown, it shall be presumed that it arose out of the employment.

As the Board of Directors said at p.18 of their determination:

It is not in dispute that a worker will have the benefit of the presumptions in subsection 3(3) only if the personal injury by accident falls within the wilful act or chance event branches of the definition of accident. If the presumptions are inapplicable, that is, if it is determined that a worker has suffered an accident which falls within the disablement branch of the definition, the question to be determined is what must such a worker show in order to be entitled to compensation pursuant to subsection 3(1) of the Act.

In the case of a disablement, it is clear that the disablement must be shown both to have arisen out of and in the course of employment. Accordingly, it is important to understand fully what these operative

phrases mean.

3. Current Board policy and practice

(a) "In the course of employment"

The Board's policy on "in the course of" employment is in Operational Policy Manual Document 03-01-02. It provides that:

> A personal injury by accident occurs in the course of employment if the surrounding circumstances relating to place, time and activity indicate that the accident was work-related.

This approach to the phrase of "in the course of" emphasizes that it is a "situational" requirement of the Act. The essential question is whether the worker was in a certain place, at a certain time, doing certain things, that are related to work. This approach is a rationalization of the majority of previous Board policies and practices relating to "in the course of", and it conforms to the view of the problem as expressed by Professor Larson[1] and in Appeals Tribunal decisions[2].

(b) "Arising out of employment"

The requirement that an accident "arise out of employment" is discussed generally throughout Operational Policy Manual Documents 03-02-01 to 03-02-12. In Document 03-02-01, the following is stated:

> An accident shall be considered to arise out the employment when it happens on the employer's premises as defined, unless at the time of the happening of the accident:
>
> - the accident is occasioned by the injured worker using, for personal reasons, any instrument of added peril, such as automobile, motorcycle, or bicycle, except when the accident was caused by the condition of the road or happening under the control of the employer, or
>
> - the worker is performing an act not incidental to his work or employment obligations.

The requirement that a personal injury by accident arise out of employment is generally considered to mean that there must be a causal connection between the employment and the accident. However, as can be seen from the above quotation, most of the information in these Documents relates to whether an accident occurs "in the course of employment" rather than to arising out of issues. It is, therefore, the definition of "arising out of" that now presents the greatest problem in defining the work-relatedness of accidents in the workers' compensation system, and the balance of this

---

1. Larson, The Law of Workmen's Compensation, and also, Larson, Workmen's Compensation (Desk Ed.) $14.00.

2. For example, Decision No. 470/88.

paper focuses exclusively on that problem.

III PERSPECTIVES ON THE "ARISING OUT OF" PROBLEM

1. The American experience and the Larson approach

In his treatise, Professor Larson says that there are two tests for the work-relatedness of injuries[3]. First, the injury must have been medically linked to the employment. Larson says that the appropriate test for this medical causation is the question whether the medical evidence establishes that the employment factor(s) made a contribution to the injury.

The second test of work-relatedness is the legal one, and in Larson's view, the appropriate way to address the question of whether an injury arises out of employment is to adopt a risk analysis approach. He briefly discusses the four risk analysis tests that have been applied by American courts over the years when determining whether the harm to which the worker was exposed was a risk of employment.[4]

(a) Risk analysis tests

The peculiar risk test, which has now been almost totally abandoned, is the most restrictive. Under this test, an injury will have arisen out of employment only if the source of harm was peculiar to the worker's occupation. For example, suppose a worker is exposed to the extreme cold of winter while working and freezes her foot. Since the risk of freezing was no greater for the worker than for any person working outside, the risk is not peculiar to the employment, and the accident would not be found to be work-related.

In contrast, the increased risk test only requires the worker to show that the employment increased the worker's exposure to a particular harm as compared to the exposure of members of the general public; the harm itself need not be peculiar to the employment. The increased risk test is currently the most prevalent in the United States. An example is a worker with epilepsy who climbed a ladder, suffered a seizure, and fell. Though the employment did not increase the likelihood of the seizure, it did increase the risk of falling, and the increased risk test is satisfied.

Some jurisdictions have adopted an actual risk test that asks whether the risk was actually a risk of the employment, regardless of whether the employment increased the worker's exposure to the risk. For example, if part of a worker's job involves walking on a sidewalk and the worker falls while so walking, the risk of the fall is an actual risk of the employment even though other people run the same risk in their daily lives outside work.

Finally, there is the positional risk test which Larson describes as

---

3. §38.83(a).

4. §7.00 - 7.40.

follows:

> An injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed claimant in the position where he was injured.

This test essentially collapses "arising out of" with "in the course of". An example is a worker who, while sitting at her desk, is hit by a bullet fired by a robber fleeing down the street. Though there is nothing about the employment inherent in the firing of the bullet, the fact that the worker was hit while in the course of employment satisfies the positional risk test.

(b) Categories of risk

The various categories of risk to which a worker may be exposed are also canvassed by Larson. Employment risks are those that are associated with employment. This category of risks poses few adjudication problems since accidents resulting from exposure to these risks will clearly arise from the employment.

In contrast, injuries stemming from risks that are personal to a worker do not arise from employment, even if the injury occurs while the worker is at work. Professor Larson cites[5] the example of a worker who has a personal enemy who has pledged to track him down wherever he may be, does track him down and murders him at his work. There is nothing about the employment that is causally related to the worker's death. Professor Ison cites a similar example[6]: a worker suffers an epileptic seizure and sustains injury by falling to the floor on a normal surface. The seizure and the injury are the result of natural, or personal, causes, and neither entitles the worker to compensation.

Neutral risks are those sources of harm that have neither a personal nor an employment character. For example, a worker may be struck by lightning, stung by a bee or hit by a stray bullet while at work. In such cases, allocation of the risk between the employer and the worker is determined through the application of the risk analysis tests described above. Larson generally favours the adoption of a positional risk test where neutral risks are involved.

Larson also refers to a category of mixed risks, where a personal cause and an employment cause combine to produce the harm. In these cases, there is always the possibility that the happening of the accident at work was only a coincidence. For example, a worker may have been headed for a heart attack, and it just happened to occur while she was lifting a 10 kg box. Larson says that an injury will arise out of employment only if the

---

5. §7.20.

6. Workers' Compensation in Canada. Butterworths, Toronto, 1983, p.25.

employment "contribute[s] something substantial to increase the risk"[7].

To indicate whether the risk is increased by the employment, Professor Larson proposes[8] that the employment exertion or exposure be compared to the non-employment experience of all people. If the employment exertion is greater, then the risk has been increased.

The rationale for this test is not complicated, and its root is the so-called 'New York wear and tear rule'[9]. If the risk of incurring a particular injury is identical in and out of the workplace, the injury cannot be said to be an employment injury: it is an injury that arises from the ordinary wear and tear of life. Where the employment increases the risk, it is truly an employment injury that people would not usually suffer in their non-employment life and that did not occur at work only by coincidence.

However, it is clear that after it is shown that there was an increased risk of the accident occurring (that is, that the exertion or exposure was greater than that of everyday life), the employment contribution does not have to be the predominant cause. In §7.40 of his Treatise, Professor Larson states:

> Another troublesome problem is that of mixed risks, in which a personal cause and an employment cause combine to produce the harm. The most common example is that of a man with a weak heart who dies because of a strain occasioned by the employment. In broadest theoretical outline, the rule is quite simple. The law does not weigh the relative importance of the two causes, nor does it look for the primary and secondary cause; it merely inquires whether the employment was a contributing factor. If it was, the concurrence of the personal cause will not defeat the compensability.

2. <u>Workers' Compensation Appeals Tribunal</u>

In general, the Appeals Tribunal has accepted that the 'arising out of' requirement means that there must have been a causal connection between the employment and the personal injury by accident, and that there are both medical and legal aspects to the question. For example, in Decision No. 918, the panel said at p.17:

> In our view, two matters must be considered in deciding this issue. One is to consider the opinions of the worker's treating physician ... on the issue of [medical] causation. The other is ... the extent to which the workplace stress itself was a significant contributing factor [legal causation].

For medical causation, Appeals Tribunal panels have tended to rely on

---

7. §38.83(b).

8. §38.83(b).

9. §38.64(a)(7) and §38.83(b).

opinions of physicians about the medical link. If there are contradictory opinions, the panels have tended to give greater weight to the more qualified physician, or the physician who has most recently examined the worker, or the opinion of the majority of doctors involved.[10]

With respect to the use of medical evidence to determine the medical causation question, the panel in Decision No. 565 said:

> In scrutinizing the relationship between the injury and the employment, a Panel will want to be satisfied that the medical evidence establishes a probable causal connection between the injury and the employment activity to which the injury is being attributed. If there is evidence of pre-existing contributing condition or disease, a Panel will want to explore the extent to which the worker's disability results from the pre-existing condition, as opposed to the employment condition. [emphasis added]

On the legal side, most Appeals Tribunal panels have echoed the approach in Decision No. 918, indicating that the employment causal connection will be satisfied if the employment was a "significant contributing factor" in the occurrence of the personal injury by accident. However, it is not clear what, in fact, the Tribunal panels mean by this test.

A panel of the Appeals Tribunal said in Decision No. 280, for example, that a significant contributing factor "is a factor of considerable effect or importance or one which added to a worker's pre-existing condition in a material way to establish a causal connection with the ultimate coronary insufficiency".

In Decision No. 918, by way of a contrast in approach, the Appeals Tribunal panel established that in situations in which a worker suffers from a disability related to "usual" workplace stressors, the workplace contribution must predominate in order to be significant. However, when such a disability is related to "unusual" stressors, the workplace contribution does not have to predominate, but it must still be significant. It is not clear whether the panel would intend that these different tests should be applied in cases not involving workplace stressors or psychiatric disabilities.

In a few cases, Appeals Tribunal panels have gone beyond the "significant causal factor" test to consider a risk analysis approach. In Decision 470/88, a worker in his employer's parking lot was injured by a button that flew off his sweater when he shook it after dropping it. In determining whether the accident arose out of employment, the panel rejected a test that asked whether the accident would have occurred 'but for the employment'. In the panel's view, a greater degree of work-relatedness was required before an accident could be said to arise out of employment. The panel then turned to the risk analysis tests described by Larson and applied Larson's increased, actual and positional risk tests to the facts of the case. It did not, however, analyze or discuss the tests and simply

---

10. See Decision No. 915, p.46, in which the Panel outlined its method of weighing medical evidence.

concluded that the accident had not arisen out of employment, regardless of which of the tests was applied.

The Appeals Tribunal has not, however, grappled with the theoretical framework of Larson's risk analysis regime although some panels have adapted parts of it. The results of this approach are apparent in Decision No. 71/87, where the panel rejected a positional risk test for determining whether a fight had arisen out of employment. It then considered Larson's three categories of risk -- personal, neutral and employment -- and concluded that fights arising from both neutral and employment risks arise out of employment. The panel thus confused the categories of risk with the risk analysis tests that must be employed to determine when accidents arise out of employment.

In Decision No. 565, the Appeals Tribunal panel echoed some of the concept of the risk analysis. The panel said:

> If the activity to which the injury is being attributed is one that is a routine part of daily living, a Panel will want to be satisfied that there is something distinctive about the employment which also contributed significantly to the occurrence of the injury.

In an April 3, 1990, decision, No. 145/89, the Appeals Tribunal panel was determining whether a worker's disability arose from workplace stressors, and appears to have adopted a relative risk analysis. The panel said, at p.10 of the decision, "This worker's stresses were, in our view, not only greater than those of everyday life and employment, but also, because of the particular conditions of his employment, greater than those of his co-workers." The panel also compared the relative contributions of workplace stressors and the stressors outside work.

3. Other Canadian jurisdictions

All other Canadian jurisdictions with legislative provisions similar to Ontario's approach the question of "arising out of" in the same manner as the Ontario WCB currently does.

IV DISCUSSION

1. A significant contribution test

The variety of factors or conditions that may combine to produce disabilities or death is very wide, and it seems difficult to devise a formula that provides an accurate answer to the "arising out of" question. As noted above, though, the Appeals Tribunal has used a significant contribution test, which in certain panels' opinions, seems to fulfill this need. It echoes some of the elements of the American approach, the common law tests in tort, and to some degree, the Board's practices. It seems therefore a reasonable way to deal with the problems of important and unimportant influences.

However, as it stands today, "significant contribution" has no consistent substantive meaning: it is largely a conclusion which does not reveal but

rather hides the process of distinguishing between important and unimportant events and conditions. But, as the Appeals Tribunal has said in Decision No. 470/88, it does have a minimum baseline: it is necessary to be able to say at the very least that the present injury would not have occurred without the employment contribution.

In this relatively undefined state, the significant contribution test allows individual decision-makers to disregard such factors or events as they think are too small to have an impact on the question of entitlement to benefits. Therefore, decision-makers are invited by the language of "significant contribution" to draw reasonable distinctions within evidence presented in the course of a particular claim's history.

It is important, however, that decision-makers in the workers' compensation system be guided by something that puts easily understood meaning to "significant contribution", because in a system that demands justice swiftly delivered, there is often not the time to sift through evidence in a leisurely fashion to decide an issue on the judicial model, and it is desirable to bring some consistency to decision-making throughout the system. In addition, in an increasingly legalistic system, it is not useful to have a test of the fundamental concept of 'arising out of', the premise of which is susceptible to change from claim to claim. It is the search for better tools for the measurement of significance that is the challenge, and possible approaches are presented in the next sections to assist decision-makers throughout the workers' compensation system in defining significance in individual claims.

As a final point, the choice of the term "significant contribution" over, for example, "material contribution" is advantageous for at least two reasons. Firstly, it avoids the temptation to interpret its content with direct reference to the common law which used the term "material contribution" in, for example, McGhee v. National Coal Board, [1972] 3 All E.R. 1008, [1972] 1 W.L.R. 1 (H.L.). "Significant contribution" has been appropriated by the Appeals Tribunal for the workers' compensation system, and it can come to have a life and meaning of its own in that system, separate and apart from legal developments elsewhere. Secondly, "significant" is a word that in popular discourse has more meaning than such a word as "material". It imports for the average person a standard of a noticeable or measurable amount of importance that "material" may not.

2. The relation of "significant contribution" and the "balance of probabilities"

It is sometimes observed that the concept of the "balance of probabilities", as modified by s.3(4), can be of assistance in determining the quantitative contribution that constitutes for a decision-maker significance for a significant contribution test. Section 3(4) provides that:

> In determining any claim under this Act, the decision shall be made in accord with the real merits and justice of the case[11] and where it is

---

11. See also s.80(1) of the Act.

not practicable to determine an issue because the evidence for or against the issue is approximately equal in weight, the issue shall be resolved in favour of the claimant.

At common law, a plaintiff is required to demonstrate that the evidence shows that it is more probable than not that his/her version of the case is valid. Section 3(4) modifies that slightly for workers' compensation purposes by suggesting that in order for a worker to be successful, it need only to be shown that it is at least likely as not that the worker's version of the claim is valid.

From time to time, it is argued that this section alone requires that the employment contribution must be as weighty as the non-employment contribution in order for the worker to be entitled to benefits. However, s.3(4) is an evidentiary section only; it does not relate to the substantive question of what amount of contribution is necessary to establish a claim. The section adverts to a balancing of the probabilities of various pieces of evidence being valid, not to a balancing of the contribution of causes.

By way of illustration, suppose that an 'any contribution' test were adopted in the workers' compensation system. In a particular claim, the evidence would have to show that it is at least as likely as not that the employment made 'any contribution' to the accident. The evidence would be weighed, and if there was some good evidence to show that the employment made 'any contribution' and some good evidence to show that the employment did not make 'any contribution', s.3(4) would give the benefit of doubt to the worker, and the adjudicator would decide that the employment did make 'any contribution'.

It is essential not to confuse the evidentiary assistance of s.3(4) with the substantive requirement for a 'significant contribution'.

3. Standards of "usual" and "unusual" for significance

Often, it is said that a certain degree of unusualness of a workplace exertion, for example, will establish its work-relatedness. There is nothing unusual in a 15 kg lift at work if a worker normally lifts 15 kg at work, and any such injury the worker suffered would not, using the "unusual" test, be found to be arising out of employment. On the other hand, if a worker has a relatively sedentary job, lifts 20 kg boxes at work one day and suffers an injury, the accident would on the terms of this test be found to be work-related[12].

Such a requirement of unusualness was found in the Board's policies relating to disablement prior to the Board of Directors' review of Decision No. 72: it was said to be necessary to show an unusual exertion or awkward movement to show a work-related disablement. As well, consultation documents from the WCB's Operational Policy Branch relating to the

---

12. Assuming also a medical causal relationship.

workplace stressors issue[13] placed considerable emphasis on the usual/unusual dichotomy as has been done in a variety of American jurisdictions and in the Appeals Tribunal's Decision No. 918.

Upon careful consideration of an "unusualness" criterion, however, it becomes apparent that the "unusualness" approach is not tenable. As Larson states,[14]

> Unfortunately, the unusual-exertion requirement is a clumsy and ill-fitting device with which to ensure causal connection, although it undoubtedly does frequently rule out cases where work-connection is questionable. The fallacy of testing work-connection by a comparison of a man's particular fatal exertion with his usual exertion is the obvious fact that in many occupations even the usual exertion is capable of causing the heart collapse. Conversely, in many occupations the usual exertion requires so little effort that even when it is exceeded the ability of this "unusual" exertion to cause heart failure is medically much more improbable. It is not as though continuous heavy work over a long period built up a strong heart, while desk work for the same period resulted in a weak heart. The longshoreman and the clerk may have hearts which, weakened by disease, are no different in their ability to withstand strain.

Further, the Board of Directors' review of Decision No. 72 makes it clear that the usual/unusual test cannot apply in Ontario. The Board decided that a disablement can be found to be work-related even when there is no identifiable chance event at work to which the injury can be linked. It would be impossible in such cases to search for a usual or unusual occurrence.

4. <u>Two tests in s.3(1) for "significant contribution"</u>

Professor Larson has suggested that the work-relatedness question has two aspects. Section 3(1) can be seen to contain these two different causation requirements: medical causation and what, for want of a better phrase, might be called the employment link or legal causation.

For the employment link requirement, a decision-maker must define what factor that potentially could have caused the injury that was related to work. Under the medical causation test, the decision-maker must determine, on the basis of medical evidence, whether the work-related factor was probably the cause of worker's injury.

---

13. See "Discussion Paper on Compensation for chronic occupational stress" (January 30, 1989) and "Options Paper: The compensability of disabilities resulting from workplace stressors" (July 14, 1989), both of which are available in the WCB Reference Library and from the Operational Policy Branch.

14. §38.81

(a) The employment link

A legal causation test, such as the one employed in tort law, is not suitable because it imports notions of fault into a no-fault regime. Furthermore, as Professor Larson notes, the very words 'arising out of' suggest a different test is appropriate.

A risk analysis approach, as described by Professor Larson in his analysis of the American experience, has particular advantages. Applying this approach, the question is whether the risk of injury to which the worker was exposed -- and which the worker experienced -- was a risk of his/her employment. There are two ways an employment link can be established for workers' compensation purposes, depending on whether the worker's personal medical characteristics may have been involved in the development of his/her impairment.

In situations involving no contribution by personal factors (that is, when the risk is an employment risk or a neutral risk, on Larson's analysis), some American courts and Professor Larson have accepted an actual risk approach to "arising out of". Therefore, if the worker was at work when the accident occurred and it was an actual risk of the employment, it arose out of the employment. The rationale for this is that there is no competing personal risk to overcome the contribution of the employment. Thus any employment contribution, even placing the worker in a place where the injury from a neutral force occurred, is enough to establish that the injury arose out of employment.

However, where the worker contributes some personal element (that is, when there is some level of personal or mixed risk), Professor Larson's approach, and the approach of most American courts and the Appeals Tribunal panel in Decision No. 145/89[15], is to require the employment to have contributed substantially to increase the risk. The reason is that the employment contribution must offset the causal contribution of the personal risk, and only an identifiable increase in risk will supply the necessary offset.

The measure of an increased risk is a difficult one, but, as outlined above, Larson's proposal is to compare the employment activity or condition to the activities and exposures of the average person in everyday life. If they are the same, there is no feature of the employment that makes it different from the ordinary wear and tear of everyday life. The happening of the accident at or near work during work hours was only coincidental, and the injury by accident is attributable to the worker's personal life and not to the employment situation. If the employment requires greater exertion or involves greater exposure than in everyday life, an injury that occurs, and that can be related medically to the employment, will be attributable to the employment and not to the risks that the average person runs all the time.

Of course, there is a small group of activities that are experienced in employment life but are never experienced in everyday non-employment life.

---

15. See the discussion of this Decision above, in section III.2.

Examples would be terminations of employment or disciplinary actions. It would be necessary in such cases to constitute a comparison group that is subject to the ordinary wear and tear of everyday work life.

In comparing the relative exertions or exposures of work life and non-work life, such features as the intensity, duration and frequency will obviously be relevant.

It is important to emphasize that this approach to legal causation is one that compares risks but not contributions. That is, to establish work-relatedness on the legal side, there is no examination of the relative roles of the personal factors and the employment factors -- the only analysis is of the relative risks of the employment and of the non-employment life of all people. The personal factors are addressed more appropriately in the medical causation test outlined in the next section.

One approach, therefore, that reflects the approaches of Professor Larson and certain Appeals Tribunal panels, is this: the employment will be found to have made a legally significant contribution to the injury where,

(1) if no personal factors contributed to the happening of the accident, there was some employment contribution; and

(2) if personal factors causally contributed in some way to the happening of the accident, the employment involved some activity or exposure that was greater than that experienced in the non-employment life of the average person.

Personal factors include any relevant prior weakness or disease of the worker or any other factors in the usual non-employment life of the worker.

The comparison changes to "employment life of the average person" when the activities or conditions are found exclusively in employment life.

(b) Medical causation

The problem of medical causation is not commonly dealt with in the workers' compensation literature. However, medical issues form an integral part of the determination of work-relatedness. Because of the variety of illnesses and conditions that must be considered, these medical causation issues can range from being relatively straight forward to extremely complex.

Historically, it is because of this complexity that many times decision-makers have referred a claim to a physician without clearly defining the medical questions that need to be answered. Physicians, in turn, may also not isolate the medically relevant question and have occasionally provided advice regarding the general compensability of the condition. These opinions may not have been strictly based on medical and scientific fact but may have reflected personal opinions regarding the justice and merits of the claim.

In addition to the general complexity of the causation issues that arise in workers' compensation situations, there is a fundamental difference in language and expectations of the causal analyses conducted by physicians

and those necessarily conducted by decision-makers who are deciding legal rights.

In the scientific sphere, the emphasis is not on an individual case, but on the general case, and inquiries are focused on defining the overall structure of a scientific problem. For example, in genetic research, the search is ultimately for "what is" rather than "what might be". In deciding generally whether a particular gene is responsible for a particular condition, it is necessary to have high levels of certainty with respect to the findings since the implications are potentially very serious.

In medical decision-making, the focus is of course on the individual case, but the inquiry is one that typically involves a weighing of the possible harm and the possible good that can result from a particular course of action. If the possible consequence is a serious one, as it might be in the case of a particular surgical procedure, the physician would want to be quite confident of the probability that the surgery will have the desired effect. Where the consequence are less serious, for example, delaying a treatment regime by a day in a flu case, the level of confidence in deciding to delay would not have to be so high.

In the legal sphere, the level of certainty similarly is flexible but not to such a great degree as in medicine. For example, the criminal law requires that facts be proved beyond a reasonable doubt because the consequences of criminal conviction are grave. In the civil law, the required level of confidence is on a balance of probabilities. In workers' compensation, this is modified, as is discussed above in IV.2., by s.3(4).

Dr. Elliott L. Segall, in an article entitled "Causality Assessment - Medical vs. Legal"[16] commented on the degrees of certainty required in scientific and medical decision-making and said the following:

> The law, however, necessarily must be far less exacting. It merely seeks a cause of the individual condition under consideration; one for which there is medical opinion to support a "likely" or "probable" connection....
>
> [The] physician must ... recognize that legal emphasis is primarily directed to whether something more likely than not occurred, rather than to an absolute demonstration of causation. In other words, there must be medical acceptance of "probable" causal connection ....

In the face of these difficulties of clarity of role and different meanings of causation, it is important that physicians be asked their opinions on medical causation in an appropriate way, so that their medical, scientific notions of causation may be used to assist and not to inhibit the

---

16. Elliott L. Segall, M.D., "Causality Assessment - Medical vs. Legal", Trial. v.5 June/July 1969, p.59. See also a more recent version of this article in Segall, "Cardiac Evaluations for Legal Purposes", in Hurst, J. Willis, M.D. and Schlant, Robert C., M.D., eds. The Heart, Arteries and Veins, 7th ed. McGraw Hill, 1989, particularly pp.1658-1661.

determination of rights in accord with legal principles demanded by the workers' compensation law.

The questions that must be asked of physicians vary, of course, with the complexity of the conditions about whose sources the workers' compensation system must make determinations.

It is important to emphasize that in most cases the nature of events and injuries allows a decision with respect to work-relatedness to be made easily. There is in the majority of cases just one factor to be considered in determining the relationship between the employment and the worker's injury, and the medically relevant questions are clear: first, can the injury and the employment factor be sensibly causally related; and second, was the one employment factor the cause the injury to happen when it did (though not necessarily to the extent it did)?

Where there are many causal factors, some of which are related to work while others are not, identification of the medical issues is more difficult. Many disablements will fall into this latter category. In such cases, physicians should therefore be asked to consider all the possible causes, and the relative roles of the employment and non-employment possible causes and their synergistic effects, if any.

In answering such questions, it would be necessary for medical professionals to consider and rely on their knowledge of the nature of the worker's condition, and to apply general medical diagnostic principles used in determining aetiology. Where there are statistical data, the physician can rely on not only his/her clinical experience and professional judgment, but should consult the medical, epidemiological and toxicological literature regarding specific injuries, employment circumstances, and exposure to hazardous substances.

Having gathered this sort of evidence from medical professionals, a decision-maker must make a legal determination whether the employment factor(s) is (are) medically significant to the worker's injury. It is suggested that a decision-maker must satisfy him/herself that the following two tests are met. First, the injury must have a plausible medical connection with the employment. Second, the role of the employment factor must be evaluated.

One approach to medical causation is, therefore, to say that the employment made a <u>medically significant contribution</u> to an accident if a decision-maker's review of medical evidence indicates that there is a plausible connection between the injury and the employment contribution, unless the evidence also indicates that it was more likely than not that the injury would have developed or occurred in any event in more or less the same timeframe without the employment contribution.

V CONSULTATION

It is essential that an appropriate consultation process be instituted to stimulate discussion and canvass views on such a fundamental issue as "arising out of". The following consultation process has been approved by the WCB Board of Directors:

(a) that this discussion paper will be circulated to the Board's External Consultation Group and such other members of the Board's communities of interest who request it;

(b) the Operational Policy Branch will hold consultation seminars in Thunder Bay, Hamilton, Windsor, Sudbury, London, Ottawa, and Toronto in October 1990, to provide an explanation of the contents of this discussion paper and an opportunity for initial reaction;

(c) a summary of the proceedings of the consultation seminars will be compiled and circulated in November 1990 to all attendees and to all members of the Board's communities of interest who request it; and

(d) the members of the External Consultation Group and all the members of the Board's communities of interest will be invited to make formal, written submissions to the Board by February 4, 1991.

After receiving the written submissions, Board administrators will report to the Board of Directors on the consultation.